

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Consumer and Governmental Affairs Bureau)	CG Docket No. 02-278
Seeks Comment on Petition for)	
Expedited Declaratory Ruling from)	
YouMail, Inc.)	

COMMENTS OF COMMUNICATION INNOVATORS

Communication Innovators (“CI”)¹ respectfully submits these comments in response to the June 25, 2013 Public Notice issued by the Consumer and Governmental Affairs Bureau (“Bureau”) in the above-captioned proceeding,² which seeks comment on a Petition for Expedited Declaratory Ruling (“Petition”) filed by YouMail, Inc. (“YouMail”).³ In the Petition, YouMail asks the Federal Communications Commission (“Commission”) to, *inter alia*, clarify the meaning of “automatic telephone dialing system” (“autodialer”) under the Telephone Consumer Protection Act (“TCPA”)⁴ and the Commission’s TCPA rules.⁵ Specifically, YouMail urges the Commission to limit the definition of the term “autodialer” to “only

¹ Communication Innovators (“CI”) is a 501(c)(4) coalition of technology companies that seeks to maximize the pace of telecommunications innovation for American consumers and businesses. CI works to identify and support important telecommunications innovations and to provide policy leaders insight into regulatory barriers that may limit their development and deployment. CI and its member technology companies strongly endorse efforts by the President, the Commission, and many in Congress to minimize the burden imposed on innovators and entrepreneurs by outdated, unnecessary, or inefficient regulations.

² Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from YouMail, Inc., CG Docket No. 02-278, *Public Notice*, DA 13-1433 (rel. June 25, 2013).

³ See YouMail, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Apr. 19, 2013) (“YouMail Petition”).

⁴ Telephone Consumer Protection Act of 1991, Pub. L. 102-243, 105 Stat. 2394, *codified at* 47 U.S.C. § 227.

⁵ See 47 C.F.R. § 64.1200 *et seq.*

equipment that has a current capacity to store and produce telephone numbers to be called using a random or sequential number generator – and is currently being used for that purpose.”⁶

As discussed below, the Commission should grant the YouMail Petition and confirm that the term “capacity” in the TCPA’s autodialer definition refers only to a *present capacity* or *current ability* to store or produce, and dial, random or sequential numbers, not to some theoretical or future capacity. Thus, equipment and technologies can only qualify as autodialers if, at the time of use, they can store or produce, and dial, random or sequential numbers without first being technologically altered. Consistent with the text of the TCPA, this clarification should apply to all communications platforms, not just to YouMail’s “virtual receptionist” application. Furthermore, to address fully the existing confusion regarding the definition of the term “autodialer,” the Commission should also grant CI’s Petition for Declaratory Ruling (“CI Petition”) regarding non-telemarketing use of predictive dialers and confirm that the term “autodialer” does not encompass all uses of predictive dialers.⁷

I. Equipment and Technologies Must Have the Present Capacity or Current Ability to Store or Produce, and Dial, Random or Sequential Numbers to Qualify as an “Autodialer” Under the TCPA

The TCPA prohibits, *inter alia*, the delivery of “autodialed” calls and text messages to wireless telephone numbers absent an emergency or the “prior express consent” of the called party.⁸ As explained below, the Commission should clarify that this restriction only applies to

⁶ YouMail Petition at 11.

⁷ See Communication Innovators Petition for Declaratory Ruling, CG Docket No. 02-278 (filed June 7, 2012) (“CI Petition”) (seeking to eliminate confusion regarding the applicability of the TCPA to predictive dialers, and asking the Commission to clarify, consistent with the text of the TCPA and Congressional intent, that predictive dialers that: (1) are not used for telemarketing purposes; and (2) do not have the current ability to generate and dial random or sequential numbers, are not autodialers under the TCPA and the Commission’s TCPA rules).

⁸ See 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1); *see also* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, 18 FCC Rcd 14014 ¶ 165 (2003)

equipment and technologies that have the “present capacity” or “current ability” to store or produce, and dial, random or sequential numbers.

The TCPA and the Commission’s TCPA rules define an autodialer as “equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”⁹ Under this definition, the phrase “using a random or sequential number generator” modifies “to store or produce telephone numbers to be called.” In addition, the phrase “to dial such numbers” refers to dialing numbers that have been randomly or sequentially stored or produced. Therefore, under the plain language of the TCPA, equipment that does not “ha[ve] the capacity” to “store or produce,” and “dial,” random or sequential numbers is excluded from the definition of an autodialer.

“Capacity” is an ambiguous concept that is not defined by the TCPA, and the Commission has neither defined the term “capacity” nor clarified its scope. This ambiguity has created significant confusion for companies and has led to skyrocketing class action litigation for businesses and increased costs to consumers.¹⁰ More than 500 TCPA cases have already been filed in 2013, nearly double the number filed during the same period in 2012. The ambiguity and confusion have also curtailed the ability of companies to offer new products and services that consumers demand, such as YouMail’s virtual receptionist application. For example, YouMail

(“2003 TCPA R&O”) (concluding that the TCPA’s restriction on autodialed and prerecorded or artificial calls encompasses both voice calls and text messages, including SMS); Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Order*, 19 FCC Rcd 15927 ¶ 17 (2004) (stating that “the TCPA prohibition on using automatic telephone dialing systems to make calls to wireless numbers applies to text messages (*e.g.*, phone-to-phone SMS), as well as voice calls”); Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, 27 FCC Rcd 1830 ¶ 2 (2012) (requiring that consent be in writing if the call is for telemarketing purposes).

⁹ 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(1).

¹⁰ See, *e.g.*, CI Petition at 10-16 (discussing the significant confusion and unintended consequences of the Commission’s TCPA autodialer decisions).

points out that this ongoing confusion has led to its being targeted in class action lawsuits premised on the basis that its software service “that enables sending of [an] optional text confirming receipt of a caller’s voicemail message” is an autodialer.¹¹

The Commission should clarify, as requested by YouMail, that the definition of an autodialer under the TCPA only includes equipment and technologies that have the present capacity or current ability to store or produce, and dial, random or sequential numbers without additional modifications to the equipment or technology. The plain English meaning of “capacity” is “ability,”¹² and YouMail’s technology has no number-generating abilities (sequential, random, or otherwise). In addition, the TCPA states that autodialers include only equipment that “*has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator.*” Congress’s choice of the present tense “has the capacity,” instead of the future tense “will have the capacity,” is informative. Thus, equipment and technologies only qualify as autodialers if, *at the time of use*, they can store or produce, and dial, random or sequential numbers without first being technologically altered. Equipment and technologies meeting this standard would have as a functioning feature the capability to store or produce, and dial, random or sequential numbers and the ability to use that functionality without the installation or modification of the existing software or hardware.

The Commission should also confirm that equipment and technologies that merely have the theoretical or future capacity – if altered – but not the actual capability, to store or produce, and dial, random or sequential numbers fall outside the autodialer definition. The Commission should not interpret “capacity” as encompassing any conceivable hardware or software

¹¹ YouMail Petition at i, 1.

¹² Oxford English Dictionary (2012) (defining “capacity” as “[t]he power, ability, or faculty for anything in particular”).

modification to a device that would permit it to store or produce, and dial, numbers randomly or in sequence. As YouMail explains, “any desktop computer or smart phone could be modified to store telephone numbers to be called by a sequential number generator and dial those numbers.”¹³

The Commission must avoid taking an overly broad approach to “capacity” or else “the evolution of the definition of the term [autodialer] . . . will come to encompass every type of telephonic device in existence, thereby preventing anyone from calling a cellular phone number without express consent or except in an emergency.”¹⁴ Such an unconstrained interpretation would make the statutory term “capacity” superfluous. Moreover, it could subject businesses and consumers to TCPA litigation if they send a text message or even manually dial a voice call to a wrong number, as such calls would be viewed as made using an autodialer. Lawsuits against YouMail and other companies like it underscore why the Commission needs to avoid any unbounded, theoretical interpretation of capacity. An unbounded interpretation would also prompt additional companies to seek declaratory rulings with the Commission on a case-by-case basis as they get sued, imposing an unnecessary administrative burden on Commission staff.

To remain consistent with the statutory text of and the legislative intent behind the TCPA, the Commission must also give meaning to the phrase “using a random or sequential number generator.”¹⁵ Therefore, any interpretation of the term “autodialer” that would encompass equipment and technologies that only have the present capacity or current ability to store and dial telephone numbers, without also requiring that a random or sequential number generator be available for use (without technological modifications) at the time of the call, would

¹³ YouMail Petition at 11.

¹⁴ *Id.*

¹⁵ *See* 47 U.S.C. § 227(a)(1).

be overly broad. Any clarification must also remain consistent with the Commission's longstanding precedent that the autodialer restriction "clearly" does not apply to "functions like 'speed dialing,' 'call forwarding,'" and other services "where numbers called are not generated in a random or sequential fashion."¹⁶ Any approach that fails to give effect to these elements would not only be contrary to law but extremely harmful to consumers, as it would sweep in nearly every type of modern communications device, including smartphones and many software- or cloud-based services where no "equipment" is being used, under the definition of "autodialer."

The Commission can also grant the YouMail Petition while continuing to prevent telemarketing abuses. For example, if the Commission is concerned about enabling new unwanted automated telemarketing calls and text messages, it has ample authority to distinguish between telemarketing and informational calls and text messages when it clarifies the meaning of the term "capacity." In fact, the Commission made a similar distinction between telemarketing and informational calls in the *Robocall Report and Order*¹⁷ and the recent *SoundBite Declaratory Ruling*.¹⁸ In addition, the TCPA has separate do-not-call protections built in to limit unwanted telemarketing calls, including the national registry and company-specific do-not-call lists.

¹⁶ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, 7 FCC Rcd 8752 ¶ 47 (1992).

¹⁷ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, 27 FCC Rcd 1830 (2012) ("*Robocall Report and Order*").

¹⁸ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, *Declaratory Ruling*, 27 FCC Rcd 15391 (rel. Nov. 29, 2012) ("*SoundBite Declaratory Ruling*").

II. Any Clarification of the Term “Autodialer” Should Apply to All Technology Platforms

The definition of the term “autodialer” in the TCPA does not distinguish between voice calling and text messaging or other platforms. Instead, it is only the specific capabilities of those platforms, as well as how those capabilities are used, that are relevant. Thus, consistent with the TCPA, any clarification in response to the YouMail Petition should apply to all voice calling and text messaging platforms that are used to make calls or deliver messages to wireless telephone numbers, not just to YouMail’s virtual receptionist application.

The fact that YouMail’s virtual receptionist application relies on text messages rather than voice calls as the means of transmission for its service does not change the legal analysis required under the TCPA. Like predictive dialers, YouMail’s service relies on a list or database of numbers to be reached. And, like predictive dialers used for informational calls, YouMail’s technology does not have the present capacity or current ability to store or produce, and dial, random or sequential numbers.

III. The Commission Should Grant the CI Petition and Confirm that the Term “Autodialer” Does Not Encompass All Uses of Predictive Dialers

CI supports the Commission’s efforts to address the confusion over the scope and meaning of the TCPA’s autodialer restriction. In the face of increasing instances of TCPA class action litigation, it is important that the Commission clarify how the TCPA should be applied, particularly before additional courts weigh in and create a confusing and conflicting patchwork of TCPA decisions.

As noted above, any Commission decision clarifying the meaning of the term “autodialer” should apply to all technology platforms. As demonstrated by the record developed in response to the CI Petition, the ongoing confusion regarding the definition of autodialer and

the applicability of the TCPA is discouraging innovation, diverting time and resources away from consumer-facing operations, chilling critical account communications, and creating substantial costs that are inevitably passed on to consumers. These problems are occurring for users of many innovative technologies, including users of predictive dialers and text message-based services.¹⁹ The CI Petition also highlights the numerous changed circumstances that have occurred since the Commission released its *2003 TCPA R&O*, underscoring further the need for clarification by the Commission.

IV. Conclusion

For the foregoing reasons, the Commission should grant the YouMail Petition and declare that “capacity” refers to a present capacity or current ability to store or produce, and dial, random or sequential numbers, regardless of the communications platform being used. Additionally, the Commission should grant the CI Petition regarding non-telemarketing use of predictive dialers.

Respectfully submitted,

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¹⁹ See, e.g., GroupMe, Inc. Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (filed Mar. 1, 2012).